ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Cable Act Reform	)	CS Docket No. 96-85
Provisions of the Telecommunications	)	
Act of 1996	)	
	)	
	)	

To: The Commission

COMMENTS OF COMCAST CABLE COMMUNICATIONS, INC.

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SUMMARY

In enacting the Telecommunications Act of 1996 (the "1996 Act"), Congress sought to alleviate several regulatory burdens upon cable operators and to foster competition in the marketplace for video programming services. Congress' intent to favor market forces over regulation should guide the Commission's interpretation of the 1996 Act's cable reforms. As it adopts final rules to implement those reforms, the Commission must give effect to the plain meaning of the statute and must not erect regulatory barriers Congress never intended.

Favoring market-based results over regulatory fiat, Congress adopted a new test for effective competition, under which competition from a multichannel video programming distributor ("MVPD") affiliated with a local exchange carrier ("LEC") triggers deregulation of a cable operator's rates. Unlike the three other tests for effective competition adopted as part of the Cable Television Consumer Protection and Competition Act of 1992, the new "LEC-affiliate" test does not contain any minimum pass or penetration rate threshold necessary to trigger a finding of effective competition. Congress clearly intended that a cable operator have the flexibility to respond to competition from a LEC-affiliated MVPD offering service in its franchise area, *regardless* of the LEC-affiliate's penetration or pass rate. The Commission should reject as inconsistent with Congressional intent any proposal to superimpose a penetration or pass rate test on the LEC-affiliate test for effective competition.

The Commission should broadly define "affiliate" in the context of the new effective competition test and adhere to the Title I definition contained in the 1996 Act. The Commission should recognize all forms of passive, as well as active, interests in determining whether a LEC has an affiliated interest in a wireless operator. This test is consistent with

Congress' expectation that LECs will represent cable operators' most formidable competitors in the video programming marketplace. A narrow interpretation which does not count passive interests would be clearly at odds with Congress' vision of vigorous competition between cable operators and LECs, competition that Congress believed would benefit video programming subscribers.

The Commission's proposed definition of "comparable programming" for the LEC-affiliate test — at least twelve channels of programming, including at least one *broadcast* signal — represents a departure from its existing definition, which requires at least one *non-broadcast* signal. The proposed definition ignores established Commission precedent that programming consisting of only non-broadcast signals can constitute effective competition to cable service. The proposed definition would also be susceptible to abuse by MVPDs, who could avoid offering broadcast signals — which, in any event, would be available to subscribers over-the-air — in order to preclude a finding of effective competition.

The Commission should streamline the procedures for resolving cable programming service tier ("CPST") rate complaints and for establishing the presence of effective competition. The Commission should require local franchising authorities to file a CPST rate complaint within 135 days of the effective date of the rate increase. The Commission should also impose a reasonable deadline by which it must decide whether to grant a cable operator's petition to establish the presence of effective competition. In both cases, reasonable deadlines are needed to ensure efficient regulatory review.

The 1996 Act exempts bulk discounts to multiple dwelling units ("MDUs") from the uniform pricing requirement. Congress intended this exemption to give cable operators the flexibility to offer bulk discounts to MDU subscribers, regardless of whether the operator

bills the subscribers individually or collectively through an arrangement with the building's management. In proposing to limit this exemption to situations in which the discount is negotiated by the building's management on behalf of all its tenants, the Commission draws an artificial distinction unsupported by the 1996 Act or its legislative history. No sound policy justifies the Commission's proposed distinction between discounts to subscribers billed collectively and those billed individually.

The 1996 Act prevents local franchising authorities from imposing on cable operators technical standards more stringent than those prescribed by the Commission. The 1996 Act further bars local franchising authorities from including in a franchise any provisions for the enforcement of technical standards. These reforms evidence Congress' belief that the Commission, not local franchising authorities, is better able to enforce its technical standards uniformly. The Commission should adopt final rules that reflect Congress' concern that intrusive local regulation of technical standards could thwart the development of more advanced cable technology.

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Comcast Cable Communications, Inc. ("Comcast"), by its attorneys, hereby submits its comments in response to the Federal Communications Commission's (the "Commission's") *Order and Notice of Proposed Rulemaking* in the above-referenced proceeding.[1/]

I. THE COMMISSION'S IMPLEMENTATION OF THE TELECOMMUNICATIONS ACT'S CABLE REFORMS SHOULD ADHERE TO THE PLAIN LANGUAGE OF THE STATUTE.

In the *Notice*, the Commission seeks comment on the appropriate scope of the Telecommunications Act's[2/] reforms to Title VI of the Communications Act. Specifically, the *Notice* asks whether the Commission should place certain limitations upon the 1996 Act's

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1/ *Order and Notice of Proposed Rulemaking*, CS Dkt. No. 96-85, FCC 96-154 (rel. April 9, 1996) (the "*Order*" and the "*Notice*").

2/ Telecommunications Act of 1996, Pub.L.No. 104-104, 100 Stat. 56 (1996) (the "1996 Act").

reforms, such as a percentage pass or penetration rate threshold for the newly adopted LEC-affiliate prong of the effective competition test.[3/] Comcast submits that the Commission's implementation of the statute should be based on two principles: the plain wording of the statute and Congress' clear intent to reform cable rate regulation procedures.

The Cable Act reforms, derived from the House bill,[4/] were intended to replace the "complicated and intrusive regulatory structure created by the Commission[, which] has severely inhibited the industry's growth."[5/] Recognizing that existing regulations impose "significant administrative and legal costs on cable operators that ultimately are borne by all subscribers," Congress concluded that market-based solutions best protect the interests of video programming subscribers.[6/] Consistent with the Congressional policy of favoring competition over regulation, the Commission should give full effect to the deregulatory language of the 1996 Act and reject any proposals that would continue to subject cable operators to the "complicated and intrusive regulatory structure" Congress sought to eliminate. This includes adherence to the plain language of the statute without any embellishments which have no support in the statute or the 1996 Act's legislative history.

3/ *Notice* at ¶ 72.

4/ *See* H.R. Rep. No. 458, 104th Cong., 2d Sess. (1996) ("Conference Report") at 169.

5/ H.R. Rep. No. 204, 104th Cong., 1st Sess. 54 (1995) ("House Report").

6/ *Id.* [add additional citations here]

II. THE 1996 ACT DOES NOT PROVIDE FOR A PENETRATION OR PASS RATE AS A CONDITION TO ESTABLISHING EFFECTIVE COMPETITION.

The Commission correctly concludes, consistent with Congressional intent, that the new test for effective competition under the 1996 Act applies to LECs (or their affiliates) whether they provide video programming services or are the licensee or owner of the facilities used to provide video services.[7/] The statute is plain in this regard: effective competition exists either (a) if a LEC or its affiliate "offers video programming services" (*i.e.*, is the "video service provider") or (b) if "any multichannel video programming distributor using the facilities of such carrier or its affiliate" offers the programming.[8/] Congress recognized that LECs — whether they provide the video services or own the facilities used to provide the service — possess the resources to provide competition to alternate video providers, thus ensuring that there will be competition in the video marketplace.[9/] The type of service provided by the LEC or the alternate MVPD is irrelevant for purposes of determining whether this new effective competition test has been met. So long as the service is a video service "other than [a] direct-to-home satellite service[]," [10/] it may be considered for purposes of the test. In this regard, a satellite master antenna television ("SMATV") system used (or owned) by a LEC to provide comparable video service should be considered a source of effective competition under the new test because the

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7/ *Notice* at ¶ 71.

8/ 47 U.S.C. § 543(l)(1)(D).

9/ 1992 Cable Act, § 2(b).

10/ *Id.*

LEC provides the video service or the facilities, and the service is not a direct-to-home satellite service.[11/]

The Commission also seeks comment on what constitutes "offer" for purposes of the new effective competition test. The Commission asks whether it should adopt its interim standards enunciated in the *Order*,[12/] and whether "Congress intended effective competition to be found if a LEC's service was offered to subscribers in any portion of the franchise area, or whether the competitor's service must be offered to some larger portion of the franchise area to constitute effective competition."[13/]

It is quite clear that the statute places no "minimum" on the penetration or pass rate necessary for a LEC to provide effective competition in a cable operator's franchise area. All that is required is that the LEC, its affiliate, or any MVPD using the LEC's facilities "offer[] video programming services" in the cable operator's franchise area.[14/] In contrast to the three effective competition tests contained in the 1992 Cable Act which specify minimum pass and penetration rates, the new test contains no such standards. Congress could not possibly have intended to condition deregulation on the presence of minimum levels of penetration or of a pass rate. Otherwise, it would have adopted such tests as part of the new

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11/ The Commission currently considers SMATV penetration in determining whether effective competition is present under the 1992 Cable Act. *Third Order on Reconsideration*, 9 FCC Rcd 4316, 4322 (1994). And, given this prior acknowledgment that SMATV facilities provide effective competition to cable operators, there is all the more reason to find that a LEC-affiliated SMATV provides effective competition under this new effective competition test.

12/ *See Order* at ¶¶ 8-11.

13/ *Notice* at ¶ 72.

14/ 47 U.S.C. § 543(l)(1)(D).

standard. Moreover, it is also reasonable to assume that because a penetration and pass rate standard is already a part of the pre-existing effective competition tests, Congress had no reason to adopt a new test that included a pass or penetration rate. Absent a specific reference in the statute or in its legislative history, the Commission cannot stray from the plain meaning of the statute as written by Congress.[15/] To read into the statute a requirement for a penetration or pass rate test would be an abuse of the Commission's discretion.

15/ *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984). Indeed, two Commissioners acknowledge this statutory interpretation. Commissioner Quello noted in his separate statement:

> [T]his [fourth] prong [of the effective competition standard] does not include, as do the other three prongs, a pass and/or penetration test. Did Congress omit a number intentionally, so that the Commission would find effective competition whenever a LEC offers service in the franchise area, regardless of the extent of such offering? I believe so.

Separate Statement of Commissioner Quello, p. 1. Similarly, Commissioner Chong stated:

> Unlike the other three "effective competition" tests, this fourth test does *not* include a percentage penetration or pass rate. In adopting an effective competition test without a specific pass or penetration rate, Congress made its intention clear that this fourth effective competition test would be met if the LEC offered service in <u>any</u> portion of the franchise area. If Congress had intended a higher standard, I believe that it would have specified a pass or penetration rate as it did in the other three effective competition tests.

Separate Statement of Commissioner Chong, p. 2 (emphases in original).

III. THE COMMISSION SHOULD UNIFORMLY APPLY ITS EXISTING DEFINITION OF "COMPARABLE PROGRAMMING" TO ALL TESTS FOR EFFECTIVE COMPETITION, INCLUDING THE NEW LEC-AFFILIATE TEST.

Under the Commission's current rules, programming is considered "comparable" for purposes of the "competing provider" effective competition test if the programming contains at least twelve channels, including at least one *non-broadcast* channel.[16/] The *Notice* proposes to adopt a different definition of comparable programming for the new "LEC-affiliate" effective competition test: at least twelve channels of programming, including at least one *broadcast* signal.[17/]

The Commission concludes that a "single definition of 'comparable programming' should apply to both prongs of the effective competition test in which that term is used."[18/] Comcast generally agrees that the nature of the programming itself — not the ownership status of the multichannel video programming distributor ("MVPD") offering the programming — should determine whether it is "comparable." Arguably, there is no sound reason to treat comparable programming differently based solely on whether the MVPD distributing the programming is LEC-affiliated.[19/]

Comcast, however, disagrees that the definition of comparable programming should be the one proffered in the Conference Report. It is significant that the 1996 Act itself does

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16/ 47 C.F.R. § 76.905(g).

17/ *Notice* at ¶ 69.

18/ *Notice* at ¶ 70.

19/ As discussed below, however, there may be other reasons why different treatment may be warranted.

not define "comparable programming," and there is no other evidence that Congress intended that the Commission abandon its prior interpretation of that term. The Commission notes that the Conference Report appears to offer a new definition of "comparable programming" for the LEC-affiliate test: "The conferees intend that 'comparable' requires that the video programming services should include access to at least 12 channels of video programming, at least some of which are television *broadcast* signals. *See* 47 CFR 76.905(g)."[20/] But significantly, as *support* for its proffered definition, the Conference Report cites the Commission's *existing* definition of comparable programming contained in Section 76.905(g), which refers to *non-broadcast* programming and which is inconsistent with the Conference Report itself.[21/] Moreover, there is no reason to assume that the provision of comparable non-broadcast programming, which the Commission included in its existing test, is less important in determining whether there is effective competition from LEC-affiliated video providers as from non-LEC-affiliated entities. To the degree that local broadcasting

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20/ Conference Report at 170 (emphasis added).

21/ The rationale which the Commission used to select its initial comparable programming test should apply with the same validity to the LEC-affiliated test. In adopting its current test for comparable programming, the Commission noted that Congress had explicitly rejected its prior test — the six signal standard — when it redefined effective competition in the 1992 Cable Act. *Report and Order and Further Notice of Proposed Rulemaking, Initial Rate Order*, 8 FCC Rcd 5631, 5667 n. 128 (*"Initial Rate Order"*). Based on this Congressional judgment that six non-duplicating broadcast signals do not represent effective competition to cable service, the Commission concluded: "We thus do not believe that a competitor carrying only broadcast signals should be deemed to offer programming comparable to that of an incumbent cable operator." *Id.*

programming is readily available, the emphasis should be placed on the availability of comparable non-broadcast programming.[22/]

The Commission's tentative definition of "comparable" programming also fails to recognize that, while the ability to offer local broadcast signals may distinguish cable operators from *some* MVPDs (notably DBS), it is a cable operator's *non-broadcast* program offerings that drive subscriber penetration. In fact, the tentative definition ignores established Commission precedent that programming consisting entirely of *non-broadcast* signals can represent effective competition to programming offered by cable systems. Subscribers are attracted to multichannel video programming services because they offer attractive non-broadcast programming that cannot be received without a subscription. The growing popularity of DBS demonstrates that competition for multichannel programming subscribers can come from services offering exclusively *non-broadcast* signals.[23/] Under the Commission's proposed rule, however, a LEC-affiliated operator providing only non-broadcast signals would *not* be deemed to provide effective competition to a cable system, even if subscribers could easily receive all local broadcast signals with an antenna. But surely

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22/ In fact, an equally plausible reading of the Conference Report would be that Congress intended to *endorse* the Commission's existing definition of "comparable programming," but mistakenly substituted the word "broadcast" for "non-broadcast." If Congress actually intended to change (rather than endorse) the *existing* definition of comparable programming, it is reasonable to assume that it would have made its intentions clear by *contrasting* its new definition with the existing version and specifically explaining its reasons for making such a change from non-broadcast to broadcast programming.

23/ *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Second Annual Report,* FCC 95-491 ¶¶ 49-50 (rel. Dec. 11, 1995) ("*Second Competition Report*").

such an operator that provided only non-broadcast signals would constitute effective competition.

The Commission has previously recognized that programming offerings that do not include local broadcast signals can and do compete effectively with traditional cable service. The Cable Services Bureau recently ruled that a cable system was subject to effective competition based, in part, on its finding that DBS and home satellite dish services offered "comparable" programming to all households in the franchise area.[24/] Extending the Commission's proposed new definition of comparable programming to the "competing provider" test would effectively negate this finding. Under this standard, DBS could *never* constitute effective competition to cable systems, despite the Commission's repeated recognition that cable operators are in competition with DBS providers.[25/]

Given the Conference Report's ambiguity on this issue, there is no clear Congressional directive to modify the Commission's definition of comparable programming. Consequently, the Commission should apply the existing definition of comparable programming uniformly to both the "competing provider" and LEC-affiliate prongs of the

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24/ *Jones Intercable, Inc.*, DA 96-361 ¶ 10 (rel. March 22, 1996).

25/ *See, e.g., id.* at ¶ 215 ("The continued growth of DBS and the entry of additional competitors may exert a significant, favorable long-run effect on market conduct and performance in video programming."); *Report and Order*, FCC 95-506 ¶ 23 (rel. Jan. 16, 1996) ("*IVDS Order*") ("[W]e have consistently sought to promote effective competition to the services provided by cable systems, and we have encouraged the development of the DBS spectrum in precisely that context."); *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, First Report,* 9 FCC Rcd 7442, 7474 (1994) ("*First Competition Report*") ("Since 1990, DBS has advanced as a potential long-term competitor to cable."); *Tempo Satellite, Inc.*, 7 FCC Rcd 2728, 2730 (1992) ("We have long anticipated that the DBS service, along with other multichannel video technologies, will provide an effective, competitive alternative to cable television.").

effective competition tests.[26/] But in any case, because the current definition of comparable programming has a reasonable basis, it should not be modified.

Whether or not the Commission decides to adopt the proposed definition, satellite-delivered broadcast channels (*e.g.*, "superstations") should qualify as "comparable programming." There is no distinction made in the Conference Report between local broadcast signals and broadcast "superstations." It would therefore be an abuse of the Commission's discretion to draw such a distinction on its own.

Comcast agrees with the Commission's conclusion that if a wireless operator installs an A/B switch or offers it for sale, it should be deemed to offer broadcast signals.[27/] A LEC-affiliated wireless operator could easily avoid triggering a finding of effective competition by not offering to provide any broadcast signals to its customers. Moreover, any mention in a wireless operator's marketing materials of the ability to receive off-air broadcast signals with an A/B switch or the availability of off-air broadcast signals to an operator's customers should be sufficient to deem broadcast signals "offered" by the wireless operator.

26/ Even if the Commission were to conclude that it was bound to follow the ambiguous language of the Conference Report, there is no reason to reverse its previous conclusion that, for purposes of the "competing provider" test, the presence of a non-broadcast channel should be recognized to establish effective competition. Given that the Commission on several occasions has recognized the importance of non-broadcast programming in providing competition to cable television operators, it is not at all clear, nor does the Commission explain, how a telco-affiliated provider of video services could provide a service competitive to a cable operator's if the LEC does not provide any non-broadcast programming.

27/ *Order* at ¶ 14.

A wireless operator otherwise could avoid offering broadcast signals in its marketing materials in order to preclude a finding of effective competition.[28/]

IV. CABLE OPERATORS MUST HAVE THE FLEXIBILITY TO OFFER NON-PREDATORY DISCOUNTS TO ANY MULTIPLE DWELLING UNITS ("MDUs") IN WHICH THEY PROVIDE SERVICE ON A BULK BASIS.

The Commission requests comment on the applicability of the uniform pricing provision to bulk rate customers, such as MDUs.[29/] The Commission tentatively concludes that discounted bulk rates may not be offered to subscribers "simply because they are residents of a multiple dwelling unit, but rather requires a 'bulk discount[],' to use the language of the statute, that is negotiated by the property owner or manager on behalf of all tenants."[30/] The Commission's notion of what constitutes a bulk rate is too narrow. The term "bulk discount" refers to the ability of a seller to use economies of scale to offer prices to multiple purchasers in a single location, regardless of whether those accounts are billed collectively (through an arrangement with the building's management) or individually.[31/] Rather than adopting its tentative conclusion, the Commission should permit cable operators

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28/ Even where a wireless operator does not offer broadcast signals as part of its service, effective competition should be deemed to exist if an operator demonstrates that broadcast signals are available off-air in a franchise area. Otherwise, a wireless operator could effectively negate a finding of effective competition where, as a practical matter, subscribers were able to receive signals using a rooftop antenna or through a multiple dwelling unit's distribution system.

29/ *Notice* at ¶ 98.

30/ *Id.*

31/ In fact, many bulk service contracts simply allow operators to offer service to residents in a building but do not guarantee universal penetration as where charges for cable service is bundled with the rent. Thus, operators that serve MDUs under contract may very well have significantly lower penetration than buildings where an operator simply has a right of access.

to offer discounted rates to individual MDU residents where service is provided in the building on a bulk basis regardless of whether the operator has a master agreement with building management or whether subscribers are individually billed.[32/] There is no practical or economic difference between serving an MDU by offering services under a rate negotiated with the building management or by simply offering service to all residents of the building.

For example, an operator may negotiate an agreement to gain access to a building and, as part of the agreement may establish a billing arrangement with the building's management. Or, the operator may simply have a right of access to a building and would therefore not need to negotiate with the management. In either case, an operator should be allowed to price its service at a bulk rate discount.

The Commission should not attempt to limit the availability of bulk discounts based on its concern regarding predatory pricing. To the extent that an operator may abuse the bulk discount exception to the uniform pricing rule, a party may file a predatory pricing complaint with the Commission. If Congress had intended to impose additional imitations on the availability of bulk discounts, it easily could have specified so.

The Commission also has requested comment on the permissibility of bulk discounts to all "private" cable systems, as defined by the 1996 Act, such as "mobile home parks and planned developments."[33/] The Commission previously held in its *Initial Rate Order* that the uniform rate provision does not preclude bulk discounts to MDUs or private and quasi-

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32/ In most cases, even where Comcast has a contract with building management to deliver services, subscribers are billed individually.

33/ *Notice* at ¶ 99.

private developments, such as "apartment buildings, hotels, condominium associations, hospitals, universities, and *trailer parks*. . . ."[34/] This interpretation, as the Commission notes, is entirely consistent with the 1996 Act's expansion of the private cable exemption.[35/]

V. THE COMMISSION SHOULD DEFINE "AFFILIATE" BROADLY, AND ADOPT THE TITLE I DEFINITION CONTAINED IN THE 1996 ACT.

Congress recognized that an MVPD with the financial backing of a LEC would be a formidable competitor to cable systems. In fact, as noted above, Congress viewed the potential competitive effects of LEC entry into the video programming market as so significant that it did not establish any penetration or pass rate thresholds for triggering deregulation of a cable system in a franchise area served by a LEC-affiliated MVPD: the very *offering* of comparable programming in the franchise area by a LEC or its affiliate constitutes "effective competition." The Commission itself has recognized and predicted that LEC entry into the video programming marketplace "may pose a greater competitive threat to cable operators than competition from other providers."[36/]

To encourage true competition between LEC-backed MVPDs and cable operators, "affiliate" must be defined broadly. Comcast believes that adhering to the Title I definition of affiliate contained in the 1996 Act meets this goal so long as the Commission recognizes that all forms of passive, as well as active interests, must be counted to determine whether a LEC has an affiliated interest.

34/ *Initial Rate Order*, 8 FCC Rcd at 5897 (emphasis added).

35/ 47 U.S.C. § 522(7) (1996 Act, § 301(a)(2)).

36/ *Waiver of the Commission's Rules Regulating Rates for Cable Services*, FCC 95-455 at ¶ 22 (rel. Nov. 6, 1995).

The Commission's rules should not elevate form over substance. Whether a LEC has the ability to influence the policies of the MVPD — not how the LEC has structured its interest in the MVPD — should determine whether the MVPD qualifies as an "affiliate" of the LEC. Where a LEC has made a sizable investment in an MVPD, it is reasonable to assume that the LEC will take an active role in assuring itself a suitable return on that investment by participation in the operation, control, and management of the MVPD. The determination of what constitutes the "equivalent" of an equity interest will therefore require a broad reading of the term "equivalent" to include not only both active and passive ownership interests, but beneficial interests such as options, warrants, convertible debentures and interests held in trust.

Although the Commission has yet to issue any decisions on what constitutes an "ownership" interest for purposes of LEC-affiliation under its effective competition rules, it has dealt extensively in the past year with defining "ownership" for purposes of the limitations on foreign ownership of broadcast licensees under Section 310(b) of the Communications Act. In those decisions, the Commission has made its approach emphatically clear: "Where, as here, the ownership of corporate shares does not correspond to the beneficial ownership of the corporation, we will not be bound by a formalistic and formulaic 'count the shares' approach that understates the true extent of alien ownership."[37/] Thus, "in those instances in which computing the number of shares owned by aliens does not fairly reflect the extent of their ownership interests in a corporation, *analyzing the capital*

37/ Fox Television Stations, Inc., *Memorandum Opinion and Order*, 10 FCC Rcd 8452, 8474 (1995) ("*Fox I Order*").

contributed from foreign sources is necessary for us to evaluate the extent of alien ownership interests."[38/]

In its recent foreign ownership decisions, the Commission has acknowledged that "we must examine the economic realities of the transactions under review and not simply the labels attached by the parties to their corporate incidents."[39/] The Commission has taken this focus on "economic realities" well beyond combinations of warrants and convertible preferred stock interests, and has treated debt as a contribution to capital — and thus as "ownership" — when a loan so functioned: "We take this opportunity to emphasize that we will apply an analysis based on the economic realities of the situation to any proposed transaction to which a distinction between debt and equity is pertinent."[40/]

An expansive view of "ownership" is even more appropriate here than in the Commission's foreign ownership decisions, because Section 76.1401 of the interim rules defines an "affiliate" not only as an entity in which a LEC owns "an equity interest . . . of more than 10 percent" but also as an entity in which a LEC owns "the equivalent thereof."[41/] The "affiliation" rule thus expressly embodies the Commission's policy of assessing ownership based on economic realities.

The inclusion of these interests as equivalent to equity is consistent with Congress' recognition that LEC-affiliated operators pose real and substantial competition to the cable

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38/ *Id.* at 8473 (emphasis added).

39/ Fox Television Stations, Inc., *Second Memorandum Opinion and Order*, 78 Rad. Reg. (P & F) 1294, 1297, ¶ 14 (1995) ("*Fox II Order*").

40/ *Id.*

41/ 47 C.F.R. § 76.1401(b).

industry. Such an analysis takes into consideration the economic realities of telephone company involvement in the provision of video services.[42/] Thus it is essential that the Commission count all of a LECs passive as well as active interests in order to carry out Congress' intent in establishing this new effective competition standard.

The Commission should also clarify that LEC ownership interests in a particular MVPD will be aggregated in determining whether the LECs' interests satisfy the "affiliation" ownership threshold. Recognizing the financial resources and marketing experience of LECs, Congress was concerned that continued rate regulation would unfairly burden cable operators in competing with LEC-backed MVPDs. That concern is no less implicated — in

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42/ The investment of Bell Atlantic and Nynex in CAI Wireless Systems, Inc. demonstrates how massive investment in a wireless operator would not be captured and counted toward the Commission's Title I standard. On March 28, 1995, BANX, a general partnership owned by Bell Atlantic and NYNEX, agreed to invest $100 million in CAI Wireless. The investment is reflected in (1) Senior Preferred Stock in CAI Wireless convertible into Voting Preferred Stock, each share of which, in turn, is convertible into 100 voting Common Shares of CAI Wireless, (2) partially prepaid warrants for the purchase of voting Common Shares, and (3) 14 percent Term Notes convertible into Senior Preferred Stock. The May 16, 1995 Schedule 13D filing made jointly with the SEC by Bell Atlantic and NYNEX succinctly summarizes the import of the investment:

> The conversion of the Senior Preferred Stock (including the shares issuable upon conversion of the Term Notes into Senior Preferred Stock) and the exercise of the Stage I and Stage II Warrant gives the BANX Affiliates [Bell Atlantic and NYNEX] the right to acquire, for an aggregate amount of approximately $302 million (including consideration originally paid for the Term Notes, the Senior Preferred Stock and such Warrants), shares of the Voting Preferred Stock which would be convertible into approximately 45 percent of the Fully-Diluted Common Shares.

Despite the fact that these LECs have already acquired the right to acquire 45 percent of the fully diluted Common Shares of CAI Wireless through the conversion of senior preferred stock and the exercise of warrants, absent the attribution of these "passive" interests toward the affiliation standard, it would not be possible to demonstrate that the communities in which CAI Wireless is operating are subject to effective competition.

fact, is even *more* implicated – when several LECs join as investors in an MVPD. Unless the Commission aggregates the interests of LECs in determining their affiliation status, a group of LECs could conceivably obtain a majority interest in an MVPD without any of the individual LECs owning enough of an interest to render the MVPD an "affiliate." This result obviously would be unfair to a competing cable system and would undermine Congress' intent to open the video programming marketplace to full and fair competition.

VI. LOCAL FRANCHISING AUTHORITIES SHOULD BE REQUIRED TO FILE CPST RATE COMPLAINTS WITHIN 135 DAYS OF A RATE INCREASE.

The *Notice* asks whether the Commission should establish a deadline by which local franchising authority ("LFA") rate complaints must be filed and proposes a deadline of 180 days after a CPST rate increase takes effect.[43/] Comcast agrees with the Commission's decision to establish a deadline, but believes that a 180-day deadline subjects cable operators to unnecessary delay and uncertainty. The Commission's proposal would allow LFAs to wait *six months* after a rate increase becomes effective to challenge the increase. A cable operator relies on regulated revenue to plan its future business strategy and finance the offering of new services, and six months of uncertainty about whether its rates will be subject to challenge would unfairly affect the development of an operator's business plans. Furthermore, the filing of a complaint only initiates the process, and the additional delay inherent in processing the complaint by the Commission would delay final resolution of the rate issue for several more months.

43/ *Notice* at ¶¶ 22, 79.

A 135-day deadline would hasten the resolution of rate disputes and would afford LFAs ample time to decide whether to file a complaint. Speedier resolution of rate disputes unquestionably would serve the public interest. If a rate increase is justified, the cable operator benefits from a more efficient complaint process by obtaining more rapid regulatory approval. If a rate increase is not warranted, subscribers benefit from a more efficient complaint process by gaining relief from an unjust rate increase sooner. A 135-day deadline, therefore, would benefit both cable operators and consumers, and it would not prevent LFAs from fully deliberating whether to file a complaint. Under the framework established by the 1996 Act, an LFA can file a CPST rate complaint only if it receives at least two subscriber complaints within 90 days after the rate increase takes effect.[44/] Thus, the 135-day deadline suggested by Comcast would provide an LFA at least 45 days to decide whether to file a rate complaint with the Commission. Forty-five days is a reasonable time for LFAs to determine whether to file a rate complaint, especially when weighed against cable operators' interest in regulatory finality.[45/]

Comcast agrees with the Commission that cable operators should no longer be required to include the name, mailing address and telephone number of the Cable Services Bureau on monthly subscriber bills.[46/] Cable operators already provide sufficient information

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44/ 1996 Act, § 301(b)(1)(C).

45/ In many cases, it is likely that the operator will have filed a Form 1240 seeking authorization for a rate adjustment well before it implements a CPST rate increase and prior to the time in which a complaint could be filed. Thus, a franchising authority would have an even longer period of time to assess the reasonableness of an operator's proposed rates. *See* 47 C.F.R. § 76.922(e).

46/ *See Notice* at ¶ 79.

on their bills to allow subscribers to file complaints with their LFA. Any additional information would only confuse subscribers, who might attempt to contact the Commission directly rather than following the prescribed complaint procedures. Those contacts would unnecessarily burden the Commission, forcing it to expend resources instructing subscribers to direct their complaints to their LFA.

The Commission should streamline the procedures by which a cable operator seeks to establish the presence of effective competition because the interim procedures announced in the *Order* do not provide adequate assurance that review and approval of a petition will be accomplished expeditiously.[47/] The interim procedures fail to establish a deadline by which the Commission must complete its review of an operator's petition, and without a reasonable deadline, an operator subject to effective competition could remain burdened by regulation for several months. During this period an operator would be unable to tailor its program offerings and respond to competition from a LEC-affiliated MVPD.

The Commission could best safeguard the interests of subscribers and cable operators by establishing a presumption that an operator filing a petition under the LEC-affiliate test is subject to effective competition.[48/] Such a presumption would be consistent with the procedures the Commission proposes to adopt for the certification of small operator status.[49/]

47/ *Order* at ¶¶ 17-18.

48/ A cable operator would, of course, remain liable for any applicable refunds if the Commission later determines that the operator is not, in fact, subject to competition from a LEC-affiliated MVPD.

49/ An operator filing for certification as a small cable system may take rate increases while its certification is pending. *Order* at ¶ 29.

Presumptive deregulation of a cable operator facing competition from a LEC-affiliated MVPD would also advance the 1996 Act's policy of favoring competition over regulation.

VII. THE 1996 ACT'S PROVISIONS REGARDING TECHNICAL STANDARDS ARE INTENDED TO PREVENT INTRUSIVE REGULATION BY LFAs.

The 1996 Act limits an LFA's ability to prescribe or enforce technical standards as part of a franchise. Section 624(e) of the Communications Act, as amended by the 1996 Act, no longer provides that "[a] franchising authority may require as part of a franchise (including a modification, renewal, or transfer thereof) provisions for the enforcement of [technical] standards prescribed under this section."[50/] The 1996 Act also deleted language from Section 624(e) that allowed franchising authorities to petition the Commission for a waiver to impose technical standards more stringent than those prescribed by the Commission.[51/] Congress replaced these provisions with a prohibition against franchising authority regulation of subscriber equipment or transmission technology: "No State or franchising authority may prohibit, condition, or restrict a cable system's use of any type of subscriber equipment or any transmission technology."[52/]

In adopting these amendments to Section 624(e), Congress sought to "avoid the effects of disjointed local regulation" of cable signal quality.[53/] The House observed that "the patchwork of regulations that would result from a locality-by-locality approach is particularly

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50/ *See* 1996 Act § 301(e); *Order* at ¶ 40.

51/ *See* 1996 Act, § 301(e).

52/ 47 U.S.C. § 544(e) (1996 Act, § 301(e)).

53/ House Report at 110.